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No. 78-865

In the

# Supreme Court of the United States

OCTOBER TERM, 1978

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE,

*Petitioner,*

*vs.*

WILLIAM H. CHRISTISON, Trustee,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT**

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on August 11, 1978.

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh District, the United States District Court for the Southern District of Illinois, Northern Division, and the Bankruptcy Court are not reported in official or unofficial reports.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit is dated and was entered on August 11, 1978. The jurisdiction of this court is involved under 28 U.S.C. Section 1254.

## QUESTIONS PRESENTED

I. Whether the bankruptcy court could assert jurisdiction over encumbered property by approving sale thereof free and clear of liens, when there was no equity or interest that could inure to the unsecured creditors particularly when the paramount lienholder objected to such sale.

II. Whether it was denial of due process of law to order the sale of secured property without any evidentiary hearing at a pre-trial conference.

## CONSTITUTIONAL PROVISIONS AND RULES OF BANKRUPTCY

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## STATEMENT OF CASE

The Bankrupts, Bert F. Ingels and Eileen K. Ingels, filed a petition for Bankruptcy under 11 U.S.C. 11, the Bankruptcy Court ordered a sale of certain encumbered property free and clear of liens despite there being no equity that could insure to the unsecured creditors. The Petitioner appealed that order to the United States District Court for the Southern District of Illinois, Northern Division, and in the United States Court of Appeals for the Seventh Circuit. The Petitioner, Peoples Savings and Loan Association of Chillicothe, has brought this suit seeking reversal of said order. The pertinent facts are these:

The Bankrupts, Bert F. Ingels and Eileen K. Ingels, had borrowed from Petitioner, Peoples Savings and Loan Association of Chillicothe, by usual form mortgages prior to being adjudicated bankrupt on January 11, 1977. The unpaid amount borrowed constituted a fully secured first, prior and paramount lien on the subject real estate to the extent of $51,576. In addition, there were other valid liens on the premises so that there were in excess of $272,587 in liens against the real estate. One of these liens was for $161,520, plus accrued interest, in favor of the Small Business Administration, which had entered into a "Stipulation" with the said William H. Christison, when he was acting as Receiver for certain property of the Ingels, to sell the premises and pay to him as fees and attorney's fees and costs of sale and administration (including referee's salary and expense fund), 15% of the gross proceeds of the sale price. Thereafter, William H. Christison, in his subsequent capacity as Trustee, filed a Complaint to sell the premises free and clear of liens for only $132,500. Peoples Savings and Loan Association

of Chillicothe answered the Complaint and set out its paramount security interests and objected to the sale.

The pre-trial conference on June 30, 1977 was attended by Petitioner pursuant to notice of Court. No witnesses appeared, no testimony was taken, no documents were produced, no proof whatsoever was submitted and no trial on the merits was ever scheduled, let alone taking place. The order for sale of real estate free and clear of all liens was drafted by the Trustee, entered by the Court on July 1, 1977, one day after the pre-trial conference, and received and first observed by Petitioner on July 6, 1977. The Petitioner on July 1, 1977 had filed a Motion for Judgment on the Pleadings, which was never considered by the Court. Immediately thereafter, in accordance with the applicable Bankruptcy Rules and the Rules of Civil Procedure, Petitioner filed its Motion for a Trial and to Amend Finding of the Court to accurately conform to Pre-Trial conversations. This was summarily denied without hearing later the same afternoon the Motion was filed, and any substantive matter raised in Petitioner's Answer or Motion For a Trial or evidentiary hearing was not considered.

## REASONS FOR GRANTING THE WRIT

### I. WHETHER THE BANKRUPTCY COURT COULD ASSERT JURISDICTION OVER ENCUMBERED PROPERTY BY APPROVING SALE THEREOF FREE AND CLEAR OF LIENS, WHEN THERE WAS NO EQUITY OR INTEREST THAT COULD INURE TO THE UNSECURED CREDITORS PARTICULARLY WHEN THE PARAMOUNT LIENHOLDER OBJECTED TO SUCH SALE.

The refusal of the court below to reverse the District Court as to the sale of the Bankrupt's property was in conflict with the guidelines set by this court in *Louisville Joint Stock Bank* v. *Radford*, 295 U.S. 555, 584, 55 S.Ct. 854, 860 (1935) as well as their own prior rulings, *In re Miller*, 95 F. 2d 441 (7th Cir., 1938) and *Standard Brass Corp.* v. *Farmers National Bank of Belvedere*, 388 F. 2d 86 (7th Cir., 1967).



In *Louisville* this court established that any sale by the Bankruptcy Court of encumbered property should not be made to the prejudice of the lienor and "by settled practice, a sale free of liens will not be ordered by the Bankruptcy Court" (295 U.S. at 584) when the property is so encumbered that no equity can inure to the benefit of unsecured creditors.

The decision of the lower court is also in conflict with the general rule held by all federal jurisdictions that it is improper to sell encumbered property in which there is no equity for the bankrupt estate, especially over the objection of the lienor, when the only result is to subject it to cost of administration. *In re Unikraft Homes of Virginia, Inc.*, 370 F. Supp. 667 (W.D. Va., 1974); *In re Bernhard Altman*, 226 F. Supp. 201 (S.D. N.Y., 1963); *Colliers on Bankruptcy, Vol.* 4A, Sec. 70.00 p. 1215 (1976).

Despite the already existing guidelines for the above situation a definitive statement by this court is needed to prevent abuse of the discretion of the Bankruptcy Court and the improper building of fees by the Trustee.

### II. WHETHER IT WAS DENIAL OF DUE PROCESS OF LAW TO ORDER THE SALE OF SECURED PROPERTY WITHOUT ANY EVIDENTIARY HEARING AT A PRE-TRIAL CONFERENCE.

The bankruptcy referee ordered the sale of the bankrupt property at the pre-trial conference, without an evidentiary hearing and despite objection of the first secured lienholder. The order without hearing evidence ap-

pears to be clearly in conflict with Bankruptcy Rule 701, Part VII, which requires that a bankruptcy proceeding ". . . (3) to sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction . . ." to be considered an Adversary Proceeding and governed by Part VII of the Rules of Bankruptcy. The Rules under Part VII require notice and trial or hearing as well as the use of Federal Rules of Civil Procedure. The instant case was a proceeding to "sell property free of a lien . . .", and thus considered an adversary proceeding under Part VII, *supra.*

The Petitioner had valuable property rights in the mortgage not limited to its right to payment and interest of the loan. These included:

Right to foreclose said mortgage after default for non-payment and other violations (including bankruptcy); right to possession of the premises; right to rents, issue and profits from the premises, and right to payment for expenses and costs incurred upon defaults and breaches defined (including bankruptcy).

These aforementioned rights are considered important property rights by the Petitioner and other lending institutions and act as a means to offset the business losses from those loans in which there is no payment or recovery to the lender.

The deprivations of these property rights without any evidentiary hearing, proof or trial whatsoever, was in direct conflict with this court ruling in *Wright* v. *Union Central Life Insurance,* 304 U.S. 502, 58 S.Ct.1025 (1938) that the Bankruptcy Court's power to affect property rights is subject to the "limitations of the due process clause . . ." (502 U.S. at 518). It is also in conflict with this court's consistent rulings that some form of hearing



is required before an individual is deprived of a property interest. *Matthews* v. *Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 902 (1976) and *Wolff* v. *McDonnell,* 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed. 2d 935 (1974).

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

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Date: October, 1978

## ADDENDUM I

IN THE
UNITED STATES DISTRICT COURT
For The Southern District of Illinois
Northern Division

No. 77-10020/C/D
77-10021/C/D

In Re

BERT F. INGELS and EILEEN K. INGELS,
Bankrupts,

WILLIAM H. CHRISTISON, Trustee,
Plaintiff,

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE, et al.,
Defendant.

### DENIAL OF MOTION FOR NEW TRIAL

This matter comes on to be heard on the Motion of the Defendant Peoples Savings and Loan Association of Chillicothe pursuant to Rule 923 of the Rules of Bankruptcy Procedure.

The Defendant, Peoples Savings and Loan Association of Chillicothe, filed a document entitled "Consolidated Answer" to two separate Complaints filed in this Court, one to Foreclose a mortgage filed by the Trustee and the other to Determine the Priority of Liens with respect to the proceeds filed by General Finance Company.

In the portion of the "Consolidated Answer" relating to the Complaint for Foreclosure, this Defendant stated

that it is entitled to be paid in full according to the terms of said mortgage.

At the Pre-Trial hearing held on June 30, 1977, counsel for said Defendant objected to the foreclosure. He was repeatedly asked by the Court to state the nature of his objection since his client would be paid in full. His answer was that his client was being deprived of its right to foreclose its mortgage. Counsel was then given an opportunity to submit any evidence of additional expenses and fees to which he claimed his client was entitled. This he refused to do. He did not ask for additional time in which to submit such information.

The Court then directed the Trustee to prepare an Order for Foreclosure. At this point counsel for said Defendant handed the Court a "Motion to Grant Additional Time to Plead." When this was denied, counsel then handed the Court his Amended Answer.

On the same day that the Court entered the Order on July 1, 1977, said Defendant filed a "Motion for Judgment on the Pleadings."

Counsel's position, that the Court had no authority to Order the foreclosure, made the necessity for a Pre-Trial unnecessary. In view of the fact that continued delay might result in the loss of $60,000 to the Bankrupt Estate over and above the amount due to said Defendant the Court fixed the Appeal Bond at $60,000, in the event said Defendant desired said Appeal to operate as a supersedeas.

The Motion for a New Trial is Hereby Denied. Entered at Peoria, Illinois, this 8th day of July, 1977.

MAX J. LIPKIN, *Bankruptcy Judge*



IN THE

UNITED STATES DISTRICT COURT

For The Southern District Of Illinois

Northern Division

Bankruptcy Nos. 77-10020
77-10021

In Re

BERT F. INGELS, EILEEN K. INGELS, Bankrupts.

Case Nos. 77-1094
77-1095

WILLIAM H. CHRISTISON, Trustee,

Plaintiff,

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE, et al.,

Defendants.

DECISION AND ORDER ON APPEAL

Peoples Savings and Loan Association of Chillicothe appeals from an order of the Bankruptcy Judge, dated July 20, 1977, which finally authorized sale of real estate of the bankrupts by the trustee, after notice to creditors and proceedings of record in the bankruptcy court, for $132,500, free of liens, with such liens to attach to the proceeds. A previous order, still effective, provides that the loan of said appellant to the bankrupt, both principal and interest, be first paid out of the proceeds of said sale. Appellant's Amended Answer in the bankruptcy court asserts that said loan balance was $51,576.16 as of June 10, 1977, so it is abundantly clear that said loan will be repaid in full.

One creditor, entitled to notice, defaulted, but all others, except appellant, consented to said sale. The Bankruptcy

Judge set a supersedeas bond in the amount of $60,000 for this appeal because of possible loss to the estate of the existing offer of $132,500, in the event of substantial delay. Appellant asserts that this is excessive, and there is no indication in the record here that any appeal bond has been filed. Appellant has filed a Memorandum of Law here, which is about six days beyond the ten days permitted by Rule 6.01 of the Bankruptcy Rules of this court, but which has been considered in this decision, issued without oral argument, under the terms of said rule.

Appellant's contentions of lack of due process of law under the Constitution can only be described as specious, in view of complete protection of its financial security interest, which is the only interest it can be reasonably considered to have had in the real estate in question. It has no legitimate basis for criticism of the bankruptcy court procedures which were employed. It also contends here that there is no benefit to the bankruptcy estate in the proceeding, but it is apparently alone in that belief, and is hardly in a position to complain unless it can show prejudice of some kind.

The only other point argued in appellant's memorandum is its "Second Affirmative Defense" asserted in its Amended Answer of June 30, 1977, that this proceeding has impaired its contract rights to foreclose its mortgage, and in that event to have possession, with its benefits, to rents, profits, etc., all in violation of the United States and Illinois constitutions. It seems only necessary to note that these rights existed by contract only to protect the mortgagee in recovery of its loan with agreed interest, which the order of the Bankruptcy Judge does. There is not impairment of contract or property rights or constitutional violation. It would require ignoring of the Bankruptcy Act completely to conceive, even theoretically, that appellant will not receive all it contracted for. The Order of the Bankruptcy Judge herein must be affirmed in all respects.



Accordingly, It Is Ordered that the Orders of the Bankruptcy Judge herein, dated July 1, July 8, and July 20, 1977, are AFFIRMED.

.....

Robert D. Morgan
United States District Judge

Entered: September 9, 1977

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
August 11, 1978.
(Argued April 19, 1978)

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. LEONARD PAGE MOORE, *Senior Circuit Judge*•
Hon. WILLIAM J. BAUER, *Circuit Judge*

IN RE:

BERT F. INGELS, EILEEN K. INGELS, Bankrupts.
WILLIAM H. CHRISTISON, Trustee,
Plaintiff-Appellee,

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois,
Peoria Division.
Nos. 77-1094, 77-1095
ROBERT D. MORGAN, *Judge*

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• The Hon. Leonard Page Moore, United States Court of Appeals for the Second Circuit, is sitting by designation.

ORDER

The court, having read the briefs, addressed itself to the record, and heard oral argument, announced in open court that the judgment appealed from is AFFIRMED.

The court can see no reason for excluding this property from the bankruptcy proceedings since the appellant will get all the money and interest to which it is entitled in those proceedings.

Similarly, we find no want of opportunity to present evidence or make contentions in the proceedings below, and thus no violation of procedural due process.

Accordingly, the Clerk of this court is directed to enter judgment AFFIRMING the judgment below.

AFFIRMED.

## ADDENDUM II

a. The pertinent portion of the Fifth Amendment to the United States Constitution reads as follows:

> "No person shall be . . . deprived of life, liberty or property without due process of law."

b. The pertinent portions of Bankruptcy Rule 701, Part VII, reads as follows:

> "The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to . . . (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction. . . . Such a proceeding shall be known as an adversary proceeding."